No. 99-449 (3)

Supreme Court, U.S.
FILED
NOV 15 1999
CLERK

IN THE

Supreme Court of the United States

RHODA OKUNIEFF,

Petitioner,

—v.—

ANNE SKOMOROSSKY, M.D., Personally, LORRAINE INNES, M.D., Personally, STAN ARCOW, M.D., Personally, ELIZABETH MIRABELLO, M.D., Personally, JANE DOE, Personally, COLUMBIA PRESBYTERIAN MEDICAL CENTER, HERBERT PARDES, in his official capacity as head of the Department of Psychiatry of Columbia Presbyterian Medical Center,

Respondents.

ON PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR PERMISSION TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI FOR THE NATIONAL ASSOCIATION FOR RIGHTS PROTECTION AND ADVOCACY; MENTAL HEALTH ASSOCIATION IN NEW YORK STATE, INC.; MENTAL HYGIENE LEGAL SERVICE, FIRST, SECOND, AND THIRD JUDICIAL DEPARTMENTS, NEW YORK STATE; DISABILITY ADVOCATES, INC.; NEW YORK ASSOCIATION OF PSYCHIATRIC REHABILITATION SERVICES; MENTAL HEALTH EMPOWERMENT PROJECT, INC.; NEW YORK LAWYERS FOR THE PUBLIC INTEREST, INC.; AND CENTER FOR PUBLIC REPRESENTATION

MARVIN BERNSTEIN
Mental Hygiene Legal Service
First Judicial Department
60 Madison Avenue
New York, New York 10010
(212) 779-1734

PETER MARGULIES
(Counsel of Record)
St. Thomas University School of Law
16400 N.W. 32nd Avenue
Miami, Florida 33054
(305) 623-2324

(*Counsel continued on inside front cover*)

26pp

SIDNEY HIRSCHFELD
DENNIS FELD
Mental Hygiene Legal Service
Second Judicial Department
170 Old Country Road
Mineola, New York 11501
(516) 746-4545

CLIFFORD ZUCKER
Disability Advocates, Inc.
5 Clinton Square
Albany, New York 12207
(518) 432-7861

JOHN GRESHAM
MARIANNE ENGELMAN LADO
New York Lawyers
for the Public Interest
151 W. 30th Street
New York, New York 10001-4007
(212) 244-4664

IN THE

Supreme Court of the United States

No. 99-449

RHODA OKUNIEFF,

Petitioner,

—v.—

ANNE SKOMOROSSKY, M.D., Personally, LORRAINE INNES, M.D., Personally, STAN ARCOW, M.D., Personally, ELIZABETH MIRABELLO, M.D., Personally, JANE DOE, Personally, COLUMBIA PRESBYTERIAN MEDICAL CENTER, HERBERT PARDES, in his official capacity as head of the Department of Psychiatry of Columbia Presbyterian Medical Center,

Respondents.

ON PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR PERMISSION TO FILE BRIEF *AMICUS CURIAE* FOR THE NATIONAL ASSOCIATION FOR RIGHTS PROTECTION AND ADVOCACY; MENTAL HEALTH ASSOCIATION IN NEW YORK STATE, INC.; MENTAL HYGIENE LEGAL SERVICE, FIRST, SECOND, AND THIRD JUDICIAL DEPARTMENTS, NEW YORK STATE; DISABILITY ADVOCATES, INC.; NEW YORK ASSOCIATION OF PSYCHIATRIC REHABILITATION SERVICES; MENTAL HEALTH EMPOWERMENT PROJECT, INC.; NEW YORK LAWYERS FOR THE PUBLIC INTEREST, INC.; AND CENTER FOR PUBLIC REPRESENTATION

Prospective *amici* respectfully move this Court for permission to file the accompanying brief *Amicus Curiae* in support of Petitioner. Consent has been sought from the parties. Petitioner has consented to submission of this brief. In September, counsel of record for prospective amici contacted counsel for respondents, who indicated that she would decline to consent. Leave of this Court is therefore requested under Rule 37.2(b).

The interest of amici is set forth in the brief. The accompanying brief addresses issues of fact and law pertaining to the involuntary commitment by private hospitals pursuant to state law. Amici provide historical background to demonstrate that civil commitment historically has been an integral component of the state's exercise of the police power. This level of state involvement justifies accountability for private hospitals under 42 U.S.C. § 1983 for wrongful involuntary commitment of individuals. The brief also provides background information on instances of abuses in involuntary commitment by private hospitals, also justifying the need for a remedy under 42 U.S.C. § 1983. Amici believe that their brief will supplement rather than repeat arguments made by the Petitioner.

/s/ PETER MARGULIES
PETER MARGULIES
(Counsel of Record)
St. Thomas University School of Law
16400 N.W. 32nd Avenue
Miami, Florida 33054
(305) 623-2324

TABLE OF CONTENTS

	PAGE
Table of Authorities	iii
Interest of Amici	1
Summary of the Argument	5
Argument	7
I. THE INTEGRAL RELATIONSHIP OF CIVIL COMMITMENT TO THE STATE'S EXERCISE OF POLICE AND PARENS PATRIAE POWER DEMONSTRATES THAT CIVIL COMMITMENT IS STATE ACTION	7
A. History Reveals That Civil Commitment Has Always Been an Exclusive Function of the State or Its Delegates	7
B. Historical Comparison To Other Forms Of Self-Help Remedies That Are Not Subject To 42 U.S.C. § 1983 Trivializes the Liberty Interests at Stake in Civil Commitment	12
II. ACCOUNTABILITY UNDER 42 U.S.C. § 1983 FOR WRONGFUL COMMITMENT BY PRIVATE FACILITIES IS A NECESSARY CHECK ON COMMITMENTS DRIVEN BY PECUNIARY INTEREST, NOT PROFESSIONAL JUDGMENT	13

PAGE

III. ALLOWING PRIVATE HOSPITALS TO PERFORM INVOLUNTARY COMMITMENTS WITHOUT ACCOUNTABILITY UNDER SECTION 1983 WOULD CONSTITUTE AN UNCONSTITUTIONAL DELEGATION OF STATE AUTHORITY..... 16

CONCLUSION..... 17

TABLE OF AUTHORITIES

Cases

PAGE

Addington v. Texas, 441 U.S. 418 (1979) 9

Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978) 11, 12

Jones v. United States, 463 U.S. 354, 361 (1983) 7

Kay v. Benson, 472 F. Supp. 850 (D.N.H. 1979)..... 12

O'Connor v. Donaldson, 442 U.S. 563 (1975).....*passim*

Okunieff v. Rosenberg, 996 F. Supp. 343 (S.D.N.Y. 1998) 9, 12

Omstead v. L.C., 119 S. Ct. 2176 (1999)..... 11

Spencer v. Lee, 864 F.2d 1376 (7th Cir. 1989)..... 12

Sporza v. German Savings Bank, 84 N.E. 406, 408 (N.Y. 1908) 7, 8, 9, 10

West v. Atkins, 487 U.S. 42 (1988).....12, 13

White v. Scrivener Corp., 594 F.2d 140 (5th Cir. 1979) 12

Willacy v. Lewis, 598 F. Supp. 346 (D.D.C. 1984)..... 12

Statutes

42 U.S.C. § 1983 (1994) .....*passim*

N.Y. Mental Hygiene Law § 7.01 (McKinney 1998)... 17

N.Y. Mental Hygiene Law § 9.41 (McKinney 1998)... 17

Secondary Sources

Paul S. Appelbaum, *Almost a Revolution: Mental Health Law and the Limits of Change* (1994) 10

PAGE

Alexis de Tocqueville, *Democracy in America* (Richard D. Heffner ed., 1956) 8

Mary K. Eamon, *Institutionalizing Children and Adolescents in Private Psychiatric Hospitals*, 39 Soc. Work 588 (1994) 14

Adam J. Falk, Note, *Sex Offenders, Mental Illness, and Criminal Responsibility: The Constitutional Boundaries of Civil Commitment After* Kansas v. Hendricks, 25 Am. J. L. & Med. 117 (1999)... 10

Flawed Law Turns Patients into Prisoners, The Boston Globe, Wednesday May 12, 1997, at 10 14

Donald Hermann, *Barriers to Providing Effective Treatment: A Critique of Procedural, Substantive, and Dispositional Criteria In Involuntary Civil Commitment*, 39 Vand. L. Rev. 83 (1986) 14

How Inpatient Psychiatric Treatment Bilks the System and Betrays Our Trust: Hearings Before the House Select Comm. On Children, Youth, and Families, 102d Cong., 2d Sess. (1992)..... 15

Dolores Kong, *U.S. Cuts Funds to For-Profit Chain; Health Officials Cite Inadequate Documentation Concerns*, Boston Globe, Sept. 1, 1999, at B6 ... 16

Barry Meier, *Midas Touch Was Billionaire's Gift to Bush*, N.Y. Times, October 30, 1999, at A1 16

Lynn Payer, *Disease-Mongers: How Doctors, Drug Companies, and Insurers Are Making You Feel Sick*, John Wiley & Sons, Inc. (1992)..... 15

John Petrila, *Redefining Mental Health Law*, 16 Law & Human Behav. 89 (1992)..... 15

PAGE

Arnold S. Relman, *Investor-Owned Hospitals and Health-Care Costs*, 309 N. Eng. J. Med. 370 (1983) 15n.2

David Rothman, *The Discovery of the Asylum: Social Order And Disorder in the New Republic* (1971) 8, 11

Kelli Schmidt, *Who Are You to Say What My Best Interest Is*, 71 Wash. L. Rev. 1187 (1996) 15

Steven J. Schwartz, *Damage Actions as a Strategy for Enhancing the Quality of Care of Persons With Mental Disabilities*, 17 N.Y.U. Rev. L. & Soc. Change 651 (1990) 13

Update, Modern Healthcare, September 27, 1999, at 24 16

Lois A. Weithorn, Note, *Mental Hospitalization of Troublesome Youth: An Analysis of Skyrocketing Admission Rates*, 40 Stan. L. Rev. 773 (1988) ... 14

INTEREST OF THE *AMICI*

National Association for Rights Protection and Advocacy

The National Association for Rights Protection and Advocacy (NARPA) is incorporated under the laws of the State of Michigan. It was founded in 1979 and has approximately 1200 members nationwide. Its membership includes recipients of mental health and developmental disabilities services; lay, professional and self-advocates; family members; service providers; disability rights lawyers; administrators; and teachers at schools of law, social work and public policy. NARPA is dedicated to promoting policies and pursuing strategies to people who have been labeled as mentally disabled. It seeks to promote rights and empowerment in housing, employment, income maintenance and treatment services. To that end, NARPA sponsors an annual advocacy conference; publishes a quarterly newsletter; provides technical assistance to a variety of advocacy organizations, government agencies, and consumer caucuses; provides testimony and information to legislative bodies; and participates as amicus in litigation related to its mission of equality under law.

Mental Health Association of New York State, Inc.

The Mental Health Association of New York State, Inc. ("MHANYS") can trace its advocacy roots back to the 19th century. MHANYS presently is comprised of 34 affiliate Mental Health Associations across New York. A notforprofit corporation, MHANYS is made up of advocates, providers and consumer so services within the mental health system. MHANYS provides training, technical assistance, selfhelp and advocacy at all levels of government, working to ensure available and accessible mental health services for all New Yorkers.

---

* Pursuant to U.S.S.C. Rule 37.6, counsel of record hereby certifies that he received no assistance from counsel for any party in this case in the writing of this brief.

Mental Hygiene Legal Service, First Judicial Department, New York State

The Mental Hygiene Legal Service (MHLS) is empowered under the New York Mental Hygiene Law to represent persons with mental disabilities in institutions and in judicial proceedings related to their disability. It represents individuals in commitment proceedings brought by both public and private hospitals under the Mental Hygiene Law and the Criminal Procedure law. It also represents individuals in guardianship proceedings, and conducts class action litigation to improve institutional conditions and community placements for persons with mental disabilities. The MHLS, First Judicial Department, represents persons with mental disabilities under such circumstances in New York County (Manhattan) and Bronx County, two areas with a very high concentration of private hospitals. The MHLS is participating in this case because it believes that institutions that confine persons against their will in violation of law should be equally accountable, whether such institutions are public or private.

Mental Hygiene Legal Service, Second Judicial Department, New York State

The MHLS, Second Judicial Department, like its sister agency in the First Department, is a New York State agency statutorily mandated to provide legal assistance to persons admitted to both public and private facilities licensed and/or operated by the New York State Office of Mental Health. It represents persons with mental disabilities in Duchess, Kings, Nassau, Orange, Putnam, Queens, Richmond, Rockland, Suffolk and Westchester Counties. The MHLS Second Department is participating in this case because it believes that, in New York State, psychiatric commitment is an exclusive duty of the State based upon its police and parens patriae powers and therefore, private entities that are licensed and regulated for purposes of carrying out this public charge should be accountable under 42 U.S.C. § 1983.

Mental Hygiene Legal Service, Third Judicial Department, New York State

The Mental Hygiene Legal Service, Third Judicial Department, plays the same broad advocacy and representational role as its sister MHLS agencies. It represents thousands of persons with mental disabilities in court proceedings in private, non-profit, and governmental hospitals in upstate New York, including Albany and Schenectady counties.

Disability Advocates, Inc.

Disability Advocates, Inc. (DAI) is a notfor profit protection and advocacy organization, which, since 1989, has provided free legal advocacy for persons with disabilities. DAI has been instrumental in establishing the rights of persons with disabilities in New York, having represented disabled individuals in *Matter of St. Luke's-Roosevelt Hospital Center, Marie H., City of New York, State of New York*, 89 N.Y.2d 889 (1996) (which established the right to counsel for at public expense for indigent allegedly incapable individuals in guardianship proceedings), *T.D. v. New York State Office of Mental Health*, 650 N.Y.S.2d 173, (1st Dept. 1996), *appeal dismissed*, 91 N.Y.2d 860 (1997) (which invalidated Office of Mental Health regulations which permitted risky nontherapeutic experiments on incapable psychiatric patients), *Chirico v. Office of Vocational and Educational Services for Individuals with Disabilities (VESID)*, 211 A.D.2d 258 (3d Dept. 1995) (which held that the state vocational rehabilitation agency must provide services to disabled individuals to eliminate unnecessary pain and hardship caused by working), *Trautz v. Weisman*, 819 F.Supp. 282 (S.D.N.Y. 1993) (which held that disabled residents of adult care facilities have a remedy under the Racketeer Influenced and Corrupt Organizations Act against the operators of adult care facilities), and many other cases enforcing the rights of persons with disabilities under the American Disabilities Act and other civil rights legislation.

The New York Association of Psychiatric Rehabilitation Services

The New York Association of Psychiatric Rehabilitation Services ("NYAPRS") is a statewide coalition of New Yorkers who are in recovery from a mental illness, and the professionals who work with them. Founded in 1981, NYAPRS also acts as the New York State chapter of the International Association of Psychosocial Rehabilitation Services. Through its member organizations, NYAPRS serves over 15,000 individuals who currently receive rehabilitation services. A priority of the organization is strengthening the rights of individuals recovering from mental illness in both inpatient and community settings. NYAPRS thus strongly supports the availability of relief under 42 U.S.C. § 1983 for persons who are deprived of their constitutional rights.

Mental Health Empowerment Project, Inc.

The objective of the Mental Health Empowerment Project, Inc., a nonprofit organization based in Albany, New York, is to maximize the freedom, independence and recovery of clients in the mental health system. It has helped start and works closely with over 500 selfhelp and advocacy groups and approximately 30 nonprofit corporations run solely by mental health consumers. Some of the clients served by Mental Health Empowerment Project are subject to unlawful confinement by private psychiatric facilities and thus have a strong and personal interest in ensuring the right be free from unconstitutional confinement, and to enforce that right under 42 USC section 1983.

New York Lawyers for the Public Interest, Inc.

New York Lawyers for the Public Interest, Inc. ("NYLPI") is a nonprofit public interest law office founded in 1977. NYLPI attorneys practice in the areas of disability rights, health law and environmental justice. Under contracts with the New York State Commission on Quality of Care for the

Mentally Disabled, NYLPI operates four federally authorized Protection and Advocacy programs in New York City, thereby serving people with a wide range of disabilities, physical and mental; these include Protection and Advocacy for Individuals with Developmental Disabilities, Protection and Advocacy for Individuals with Mental Illness, and Protection and Advocacy of Individual Rights. NYLPI has substantial relevant expertise as a result of the fact that it handles a broad array of matters on behalf of patients and residents of psychiatric facilities and residences for the developmentally disabled, and represents individuals with disabilities on a wide array of issues.

Center for Public Representation

The Center for Public Representation, based in Northampton, Massachusetts, is a national advocacy organization that represents people with mental illness in civil commitment proceedings, institutional reform litigation, and related matters. The Center is funded by the federal government to provide protection and advocacy services for people with mental illness in Massachusetts. Since nearly all acute mental hospital admissions in Massachusetts are to private facilities and because the majority of admissions are involuntary, most of the Center's clients are individuals who have at one time or another been involuntarily admitted to a private psychiatric facility. These individuals have an interest in enjoying the same rights to redress for wrongful commitments as those persons committed to governmental facilities.

SUMMARY OF THE ARGUMENT

Involuntary commitments by private hospitals are an integral element of the states' exercise of their authority to protect the public under the police power. Civil commitment confines an individual against her will for a significant period of time because the committing institution believes that the individual poses a threat to self or others. In guarding against

this threat, state law, policy, and practice assign a key role to civil commitment by private hospitals. This integral role in the state's exercise of its police power distinguishes involuntary commitments by private hospitals from other, incidental deprivations of liberty by private actors, such as the temporary detention of shoplifters pending arrival of police officers. As with any form of confinement integral to the exercise of the police power, including confinement in privately operated jails, accountability under 42 U.S.C. § 1983 is central to vindication of constitutional rights.

History confirms the integral role of private involuntary commitment in the exercise of the police power. Before this Court applied constitutional protections to the commitment process, procedural abuses in private involuntary commitments tracked the manifold abuses in state institutions that impelled federal judicial intervention. Far from demonstrating, as the courts below asserted in the instant case, any functional separation between state and private involuntary commitment, this joint history of overreaching demonstrates the integral relationship of state and private confinement of individuals pursuant to the police power. Indeed, history reveals that since the early 1800's, states and private facilities have collaborated closely on exercising the police power through involuntary commitment.

Factors that obscure professional judgment in the for-profit private sector enhance the need for constitutional accountability under 42 U.S.C. § 1983 for involuntary private commitment. Aggressive marketing, bed-filling practices, and outright fraud spurred by the need for insurance dollars have muted the exercise of professional judgment in private, for-profit involuntary commitments. The fourteenth amendment does not authorize holding liberty interests hostage in the hunt for profits. Accountability under 42 U.S.C. § 1983 for private hospital abuses of the commitment process simply evens the scales of justice.

ARGUMENT

I. THE INTEGRAL RELATIONSHIP OF CIVIL COMMITMENT TO THE STATE'S EXERCISE OF POLICE AND PARENS PATRIAE POWER DEMONSTRATES THAT CIVIL COMMITMENT IS STATE ACTION.

This Court has recognized repeatedly that civil commitment is a "significant deprivation of liberty," *see Jones v. United States*, 463 U.S. 354, 361 (1983), justified only by the state's exercise of its police and parens patriae powers. *See O'Connor v. Donaldson*, 442 U.S. 563 (1975). Due process, this Court held, required that states tailor civil commitment to the state's police and parens patriae powers by predicating civil commitment on an express finding that the individual subject to commitment was dangerous to herself or others. *See O'Connor v. Donaldson*, 442 U.S. 563 (1975). Because of its integral relationship to the state's police and parens patriae powers, civil commitment constitutes state action whether it is performed by the state directly or by private institutions acting as the state's delegates.

A. History Reveals That Civil Commitment Has Always Been an Exclusive Function of the State or Its Delegates

Courts have found in the early history of the states a warrant for viewing civil commitment as state action. As a definitive New York Court of Appeals decision noted, from the early history of New York "detention [of "idiots" and "the insane"] was sanctioned under the police power of the state on account of the necessity of protecting them and the public from their disordered minds and insane acts." *See Sporza v. German Savings Bank*, 84 N.E. 406, 408 (N.Y. 1908). In explaining its holding, the court observed that,

> Jurisdiction is inherent in the state over unfortunate persons within its limits who are idiots or have been deprived of the use of their mental faculties. It is its duty to protect the community from the acts of those persons who are not under the guidance of reason, and also to protect them, their persons and their property from their own disordered and insane acts. In England, whence our law respecting idiots and lunatics is derived, the custody and care of such persons and their property are part of the prerogative of the sovereign . . . On our separation from Great Britain . . . the king's prerogative . . . was vested in the people of the state . . .

Id. The *Sporza* Court's analysis confirms that all institutions that detained individuals under this prerogative of the state acted as the state's delegates.

In holding otherwise in the instant case, the courts below forgot Tocqueville's injunction to base historical judgments "not on any single reason, but upon the mass of evidence." *See* Alexis de Tocqueville, *Democracy in America* 38 (Richard D. Heffner ed., 1956). The courts below failed to cite to *Sporza* or consider its view that civil commitment is authorized only by the state's power or the delegation of the state's power to private actors. In addition, the courts below failed to consider the other ample historical evidence of the integration of governmental and private commitment efforts. *See* David Rothman, *The Discovery of the Asylum: Social Order And Disorder in the New Republic* 266, 277-81 (1971) (detailing collaboration of governmental and private actors in commitment process). Instead, the courts below relied on two factors: private actors' historical participation in civil commitment and the extreme informality of the commitment process. Taken in context, however, both of these factors support petitioner's view of private commitment as the delegated exercise of state police power.

In the instant case, the district court, affirmed per curiam by the Court of Appeals, made much of the fact that in New York, involuntary confinement of the mentally ill originated in private homes. *Okunieff v. Rosenberg*, 996 F. Supp. 343, 355 (S.D.N.Y. 1998) (citing Henry M. Hurd et al., 1 The Institutional Care of the Insane in the United States and Canada 40, Johns Hopkins Press, 1916). The *Sporza* Court's analysis demonstrates, however, that the involvement of private actors is entirely consistent with an integrated scheme involving both the direct exercise and delegation of state police power. *Sporza* notes that it was "common practice for the relatives and next of kin of persons who had become insane, if violent, to restrain them and place them in some retreat or institution for their care and medical treatment." *Sporza v. German Savings Bank*, 84 N.E. at 408. The *Sporza* Court notes, however, that the remedy for such restraint always has been one reserved for excesses of *state power*: "The writ of habeas corpus was always available to inquire into the cause of such detention and to release such persons in case they were found sane." *Id.*

The district court also relied on the historical informality of the civil commitment process as evidence that commitment was not an exclusively public function. *See Okunieff v. Rosenberg*, 996 F. Supp. 343, 355-56 (S.D.N.Y. 1998). Here, too, the court's analysis is correct as far as it goes. What is missing from the court's analysis is a recognition that informality in civil commitment was a central element of the exercise of the state's police power to promote the detention of persons labeled as mentally ill.

Today, after this Court's recognition of the constitutional dimensions of commitment in landmark cases such as *Addington v. Texas*, 441 U.S. 418, 425 (1979) and *O'Connor v. Donaldson*, 442 U.S. 563, 580 (1975) (Burger, C.J., concurring), civil commitment procedures have a formal cast that befits the liberty interests at stake. These procedural requirements, such as *Addington*'s holding that continued civil com-

mitment requires proof by clear and convincing evidence, indisputably govern both state and private commitments today. If, historically, the state had subjected itself to procedural requirements in the civil commitment arena, but had permitted private actors to operate free of such constraints, the district court would have had a clear basis for its view that commitment was not a public function. However, the legal landscape in the early days of the republic was quite different.

In the early days of the republic, which the district court uses as a historical guide, informality was the rule in civil commitment for both public and private agencies. No safeguards attached to commitment ordered by either state or private agencies until the second quarter of the nineteenth century. For both governmental and private agencies, record-keeping regarding such involuntary confinements of individuals was the only requirement. *See* Adam J. Falk, Note, *Sex Offenders, Mental Illness, and Criminal Responsibility: The Constitutional Boundaries of Civil Commitment After Kansas v. Hendricks*, 25 Am. J. L. & Med. 117, 123 n.60 (1999), *citing Paul S. Appelbaum, Almost a Revolution: Mental Health Law and the Limits of Change* 20 (1994).

The district court in the instant case failed to address the consequences that acknowledgment of this informal legal landscape yield for its public function analysis. Since procedural requirements did not then attach to the commitment process, the absence of differentiation between governmental and private actors in civil commitment does not resolve the public function issue. Far from conclusively demonstrating that civil commitment was not a public function, the historical evidence, confirmed by the New York Court of Appeals view in *Sporza v. German Savings Bank*, 84 N.E. at 408, suggests more readily that governmental and private committing agencies were close collaborators using the informality of civil commitment to promote public goals of maintenance of order and safety.

Also absent from the district court's analysis is any consideration of the historic costs of the unchecked deprivations of liberty wrought by civil commitment. The focus of involuntary commitment was the segregation of persons labeled as mentally ill. *See Omstead v. L.C.*, 119 S. Ct. 2176, 2181 (1999) (describing historic segregation of persons with disabilities in institutions); *cf.* Rothman, *supra*, at 137 ("The first postulate of the asylum program was the prompt removal of the insane from the community.") "As soon as the first symptom of the [mental] disease appeared, the patient had to enter a mental hospital," *id.*, with no requirement of a formal commitment proceeding. Eventually, the asylums took on more of a custodial function than a rehabilitative function. Rothman, *supra*, at 238. The inspection of asylums was substandard, and institutions became "hotbeds of neglect and cruelty," *Id.* at 269.

As American law moves beyond this history of institutional segregation, accountability under section 1983 should follow suit. Indeed, the error of the courts below in the instant case may reside principally in their selection of the wrong historical period to be examined to determine whether civil commitment is an exclusively public function. After *O'Connor v. Donaldson*, 442 U.S. 563 (1975), which held that an individual could be committed only upon a finding of dangerousness to self or others, the state's police power became the only constitutionally permissible basis for civil commitment. After *O'Connor*, therefore, civil commitment became one element of the state's provision of "police protection" to its citizens. Under this Court's decision in *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978), "police protection" is a core public function. *Id.* at 163-64. Pre-*O'Connor* history, including the early days of the Republic relied on by the courts below, is irrelevant for state action purposes. Since *O'Connor*, civil commitment has fit squarely into the police protection paradigm identified in *Flagg Bros* as a core public function. As a component of this core public function, civil

commitment since *O'Connor* clearly constitutes state action. As the "private prison" case demonstrates, the state's delegation of its police power to private parties does not dissolve the remedies for constitutional violations embodied in section 1983. *See West v. Atkins*, 487 U.S. 42 (1988). Remedies for deprivations of liberty and due process in civil commitment should hinge not on such delegation, but on the function of civil commitment as a crucial component of the state's police power.

B. Comparison To Other Forms Of Self-Help Remedies That Are Not Subject To 42 U.S.C. § 1983 Trivializes the Liberty Interests at Stake in Civil Commitment.

Misleading comparisons regarding the public function served by civil commitment extend beyond the realm of history. Many courts erroneously compare civil commitment by private parties to instances in which private parties deprive an individual of liberty or property without being subject to section 1983 scrutiny. *See Spencer v. Lee*, 864 F.2d 1376, 1381 (7th Cir. 1989); *Okunieff*, 996 F. Supp. at 356. However, the type of deprivation of liberty involved in civil commitment distinguishes it from the often-cited examples of detaining shoplifters, *White v. Scrivener Corp.*, 594 F.2d 140 (5th Cir. 1979), or repossession of property, *Flagg Bros. v. Brooks*, 436 U.S. 149 (1978). Such comparisons fail to take into account that a physician "is not simply availing himself of a 'self-help' remedy with the acquiescence of the state; instead the function he performs is more akin to the state's power and duty to protect against threats to the general public and to care for those unable to care for themselves." *Willacy v. Lewis*, 598 F. Supp. 346, 349 (D.D.C. 1984); *see also Kay v. Benson*, 472 F. Supp. 850, 851 (D.N.H. 1979) ("Th[e] power of detention is the type normally and historically exercised by the sovereign states and other governmental entities.")

A closer look at repossession and detention of shoplifters reinforces this point. Repossession of chattels involves depri-

vation of a property interest, not a liberty interest. Furthermore, repossession is a remedy designed to protect the property interests of a vendor or lender. Civil commitment, in contrast, which contemplates confinement of a person deemed to pose a danger to self or others, is an exercise of the state's police power. *See O'Connor v. Donaldson*, 442 U.S. 563 (1975). Detention of shoplifters is also a remedy designed to uphold shopowner's property interests. Detention of shoplifters is brief, bounded by the arrival of police officers or the shopowner's ejection of the offending party. Consequently, both the overlap with the police power and the abridgment of liberty interests are incidental in nature. In contrast, when private hospitals commit a person against her will, they confine her for a sustained period of time—thirteen days, in the instant case, JA-404-405—in order to protect the patient and/or the public from danger. This situation is analogous to detention of accused criminals, delinquent children, or aliens that clearly constitutes state action. *Cf. West v. Atkins*, 487 U.S. 42 (1988) (stating that private physicians under contract with the State to provide medical care to prisoners engaged in state action despite the fact that the challenged activity turned on medical judgments).

II. ACCOUNTABILITY UNDER 42 U.S.C. § 1983 FOR WRONGFUL COMMITMENT BY PRIVATE FACILITIES IS A NECESSARY CHECK ON COMMITMENTS DRIVEN BY PECUNIARY INTEREST, NOT PROFESSIONAL JUDGMENT.

A section 1983 remedy for wrongful private commitments serves the same salutary purpose as relief for wrongful deprivations of liberty in other contexts: it promotes compliance with the rule of law. *See* Steven J. Schwartz, *Damage Actions as a Strategy for Enhancing the Quality of Care of Persons With Mental Disabilities*, 17 N.Y.U. Rev. L. & Soc. Change 651, 685-86 (1990) (discussing the potential of institutional self-imposed remedial measures if the prospect of liability for damages exists). The excesses and abuses evident in the his-

tory of civil commitment demonstrate the importance of such incentives for lawful behavior by committing authorities. *See* Donald Hermann, *Barriers to Providing Effective Treatment: A Critique of Procedural, Substantive, and Dispositional Criteria In Involuntary Civil Commitment*, 39 Vand. L. Rev. 83 (1986) ("While the development of procedural rights raises obstacles to the imposition of effective treatment, this development, on the whole, has been desirable."). In the private (and particularly private for-profit) hospital setting,[1] accountability under section 1983 is a crucial antidote to the noxious influence that monetary concerns exert on professional judgment.

Congress, state legislatures, and commentators have all expressed grave concern about the adverse effect of private hospitals' pecuniary interests on the professional integrity of their admissions and treatment decisions. High fixed costs place a premium on filling beds in hospitals. A Boston Globe review of State Department of Mental Health records found several Massachusetts hospitals determined to keep their hospital beds filled, regardless of the patient's condition. *Flawed Law Turns Patients into Prisoners*, The Boston Globe, Wednesday, May 12, 1997, at 10; *cf.* Lois A. Weithorn, Note, *Mental Hospitalization of Troublesome Youth: An Analysis of Skyrocketing Admission Rates*, 40 Stan. L. Rev. 773, 813 (1988) ("The fact that these facilities' profits increase when beds are filled raises serious doubts about the ability of their staffs to function as 'neutral factfinders' "); Mary K. Eamon, *Institutionalizing Children and Adolescents in Private Psychiatric Hospitals*, 39 Soc. Work 588, 592 (1994) ("for-profit hospitals have also been criticized for using aggressive mar-

---

[1] Respondent in the instant case is a non-profit institution. This alone, however, does not counsel against section 1983 accountability. First, this Court must consider the entire range of institutions and individuals affected when it rules. Second, states are non-profit entities, yet it is undisputed that a state psychiatric facility is subject to liability for wrongful commitments under section 1983.

keting techniques aimed more at filling their beds than providing services that may be in the best interests of their patients").[2] The pursuit of reimbursement dollars supplied by psychiatric admissions may help account for the increased civil commitment by private hospitals. *Cf.* John Petrila, *Redefining Mental Health Law*, 16 Law & Human Behav. 89, 91 (1992) (noting increase in private commitment rates).

The United States Congress has found troubling evidence that financial pressures have led to substantial abuses in private psychiatric admissions. In 1992, a Committee of the United States House of Representatives investigated the practices of private psychiatric hospitals in the United States. The committee found thousands of adolescents, children and adults hospitalized for psychiatric treatment that was unnecessary and unjustified. Lynn Payer, *Disease-Mongers: How Doctors, Drug Companies, and Insurers Are Making You Feel Sick*, John Wiley & Sons, Inc. 234-35 (1992). After further investigation the committee uncovered an array of egregious practices by private hospitals. Private hospitals held patients against their will until their health benefits expired; pressured staff psychiatrists to boost admissions to increase profits; and even funneled kickbacks to school counselors for committing students. *Id.*; *cf.* Kelli Schmidt, *Who Are You to Say What My Best Interest Is*, 71 Wash. L. Rev. 1187, 1211 (1996); *citing How Inpatient Psychiatric Treatment Bilks the System and Betrays Our Trust: Hearings Before the House Select Comm. On Children, Youth, and Families*, 102d Cong., 2d Sess. (1992).

Abuses in one major chain of private psychiatric hospitals—Charter Behavioral Health Systems—illustrate how economic pressures adversely affect patients. State regulators in New Hampshire forced Charter to close the adolescent unit of their Nashua, New Hampshire facility, citing a failure to rem-

---

[2] On the cost pressures which for-profit hospitals face, see Arnold S. Relman, *Investor-Owned Hospitals and Health-Care Costs*, 309 N. Eng. J. Med. 370 (1983).

edy abusive and unsafe practices, including "untrained staff, unsanitary conditions, improper use of restrains, record-keeping violations and sexual abuse of teen-agers and children." *See* Barry Meier, *Midas Touch Was Billionaire's Gift to Bush*, N.Y. Times, Oct. 30, 1999, at A1, A11 (discussing regulatory investigations of Charter Behavioral Systems, which is owned by a friend and business associate of the governor of Texas). The federal Health Care Financing Administration (HCFA) demanded changes in Charter hospitals in Massachusetts that had used restraints improperly in cases involving 9- and 10-year-old children. See Dolores Kong, *US Cuts Funds to for-profit chain; Health officials cite inadequate documentation concerns*, Boston Globe, Sept. 1, 1999, B6; cf. *Update*, Modern Healthcare, Sept. 27, 1999, at 24 (reporting that HCFA had given Charter Systems until Feb. 14, 2000 to remedy deficiencies). These investigations stemmed from a report on the CBS News program "60 Minutes II" that uncovered substantial evidence of improper psychiatric admissions and other abuses in Charter Systems facilities. See Kong, *supra*. Accountability under sec. 1983 for wrongful civil commitments can play a healthy role in discouraging such abuses.

III. ALLOWING PRIVATE HOSPITALS TO PERFORM INVOLUNTARY COMMITMENTS WITHOUT ACCOUNTABILITY UNDER § 1983 WOULD CONSTITUTE AN UNCONSTITUTIONAL DELEGATION OF STATE AUTHORITY.

The pecuniary interests distorting private hospital admissions also defeat the reliance of the courts below on the "professional judgment" of physicians as a neutral, bounded basis for confining people against their will. Without section 1983 accountability, private hospitals have a massive grant of authority from the state to confine people against their will, but no meaningful standard for exercise of that authority except the successful pursuit of bodies for filling beds. New York's Mental Hygiene Law, § 7.01 states, in pertinent part:

"*The state of New York and its local government[s]*" have the responsibility for the prevention and early detection of mental illness and for the comprehensively planned care, treatment, and rehabilitation of their mentally ill citizens." N.Y. MENTAL HYGIENE LAW § 7.01 (McKinney 1998) (emphasis added). New York State and other states choose to make private institutions an integral part of the plan for meeting this goal. States delegate responsibility, including the responsibility for involuntary commitment, to private institutions. However, such a delegation should not defeat accountability under § 1983.

Preserving accountability under § 1983 is particularly crucial because an individual's confinement in a private as opposed to government hospital is often a product of fortuity. Commitments to private, rather than public facilities frequently occur simply because a police officer deems transporting the individual to a private facility to be more convenient. *Cf.* N.Y. Mental Hygiene Law § 9.41 (1998) (setting out authority of police officers in emergency commitments). Accountability under § 1983 should not hinge on such happenstance. Citizens victimized by private institutions through wrongful involuntary commitments like the 13-day confinement endured by petitioner in the instant case should have the same recourse against delegates of the state that citizens possess when governmental officials directly abuse the police power.

CONCLUSION

Allowing the state to continuously delegate its power to private physicians and hospitals without any recourse or responsibility is a grave danger in any constitutional system. Deprivation of liberty, involuntary commitment of perfectly healthy individuals, and insurance fraud are among the consequences of this delegation without responsibility. Remedying these consequences requires recognition of a simple,

time-honored principle: ongoing deprivations of liberty integral to state exercise of the police power, such as those wrought by civil commitment, constitute state action. Based on the foregoing points and authorities, amici respectfully request that this Court grant *certiorari* to resolve the error applied by the Southern District of New York and the Second Circuit.

Dated: Miami, Florida
November 9, 1999

Respectfully submitted,

PETER MARGULIES[3]
(Counsel of Record)
St. Thomas University School of Law
16400 N.W. 32nd Avenue
Miami, Florida 33054
(305) 623-2324

MARVIN BERNSTEIN
Mental Hygiene Legal Service
First Judicial Department
60 Madison Avenue
New York, New York 10010
(212) 779-1734

SIDNEY HIRSCHFELD
DENNIS FELD
Mental Hygiene Legal Service
Second Judicial Department
170 Old Country Road
Mineola, New York 11501
(516) 746-4545

---

[3] Counsel for amici curiae gratefully acknowledges Prof. Kelley Roark of St. Thomas University School of Law and law interns John Cavo and Brian Manno for their assistance in preparing this brief.

CLIFFORD ZUCKER
Disability Advocates, Inc.
5 Clinton Square
Albany, New York 12207
(518) 432-7861

JOHN GRESHAM
MARIANNE ENGELMAN LADO
New York Lawyers for
the Public Interest
151 W. 30th Street
New York, New York 10001-4007
(212) 244-4664